IN THE

Supreme Court of the United States

October Term, 1962

No. 51

CITY OF FRESNO,

Petitioner,

vs.

STATE OF CALIFORNIA, UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES — PAGE

TEXTS

PAGE

UNITED STATES STATUTES

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I.

OPINIONS IN THE COURTS BELOW.

The opinions in the District Court, the Decision No. D 935 of the California Water Rights Board and those of the Ninth Circuit Court of Appeals are set forth at page 2 in petitioners' opening brief and are incorporated herein by reference.

II.

JURISDICTION.

The jurisdiction of this Court is set forth at page 6 of petitioners' opening brief and is incorporated herein by reference.

III.

THE CONSTITUTIONAL, PROVISIONS, STATUTES AND DOCUMENTS WHICH THE CASE INVOLVES.

The constitutional provisions, statutes and documents which the case involves are set forth in Appendix "A" of petitioners' opening brief, pages 1 to 19 thereof, and incorporated herein by reference.

The constitutional provisions, statutes and documents specifically referred to in this brief are here listed.

> "SEC. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and *the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws,* and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That *the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.*" (emphasis ours)
>
> Act of June 17, 1902, 32 Stat. 388 at 390 (43 U.S.C. 391).

"The Secretary is authorized to enter into contracts to furnish water for municipal water sup-

ply or miscellaneous purposes: *Provided*, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ percentum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 percentum per annum, and such other fixed charges as the Secretary deems proper: *Provided further*, That in said sales or leases preference shall be given in municipalities and other public corporations or agencies: and also to cooperatives and

other non-profit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936 and any amendments thereof. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and alternative to any authority in existing laws relating to particular projects. *No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the effiency of the project for irrigation purposes.*" (emphasis ours)

Act of August 4, 1939, 53 Stat. 1187 at 1194.

"Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized THE SECRETARY OF THE INTERIOR SHALL MAKE RECOMMENDATIONS FOR THE USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO THE COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)

Act of October 14, 1949, 63 Stat. 852 and 853.

"Sec. 2. The Secretary is hereby authorized to negotiate amendments to existing contracts entered into pursuant to section 9, subsection (e), of the Reclamation Project Act of 1939 to conform said contracts to the provisions of this Act.

"Sec. 3. As used in this Act, the term 'long-term contract' shall mean any contract the term of which is more than ten years.

"Sec. 4. Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired, thereunder, and the Secretary in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

"Sec. 5. This Act shall be a supplement to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto).

Approved July 2, 1956."

Act of July 2, 1956, 70 Stat. 483 at 484.

IV.

QUESTIONS PRESENTED FOR REVIEW.

The same questions set forth at page 90 of petitioners' opening brief constitute the general questions presented for review in this brief, which said questions for review are incorporated herein by reference.

However, all of these questions will not be specifically commented upon in this brief. We will limit our argument to answering respondents' brief insofar as said brief relates to the questions presented for review in petitioners' opening brief herein.

We will particularly stress the following questions:

Whether under the Basic Reclamation Act of June 17, 1902, 32 Stat. 388, 389-390, and the Act of October 14, 1949, 63 Stat. 852, 853, the respondent Bureau of Reclamation officials are required to proceed in conformity with California county and watershed of origin protective statutes.

Whether the determination of the question of the limits of the statutory authority of the Bureau of Reclamation officials is a judicial determination and not an administrative determination, and if it is a judicial determination, whether the decision of the District Court that any charge for strictly irrigation water (not municipal water) to the City of Fresno in excess of $3.50 per acre-foot is unreasonable, is a judicial or an administrative determination.

Whether the City of Fresno is entitled to at least 100,000 acre-feet of water out of the Central Valley Project (being 40,000 more than the contract finally awarded the City of Fresno) in view of the fact that there is no other possible source of supply for this water

to the City other than out of the San Joaquin River, and whether it is even beyond the power of Congress after it has constructed dams on every stream in the San Joaquin Valley including the San Joaquin River to prohibit the City of Fresno from obtaining a sufficient water supply at reasonable rates in order to survive until all secondary agricultural requirements in the San Joaquin Valley are first met.

V.

STATEMENT OF THE CASE.

We again incorporate by reference the statement of the case beginning at page 14 of petitioners' opening brief and will not again repeat it here.

VI.

ARGUMENT.

A. Respondents Failed to Answer Most Major Arguments of Petitioner City of Fresno. It Is Assumed They Were Unable To.

Respondents failed to answer many of the major arguments raised by petitioner City of Fresno in its brief and in some cases attempted to raise new issues not set forth in their petitions for certiorari. Since these issues which respondents failed to answer go to the fundaments of the present case, we assume they were unable to answer them and that the petitioner City of Fresno's arguments are correct. Petitioner City of Fresno's major arguments in this case which respondents failed to answer are here set forth.

1. That All Respondents Requested the District Court to Make Decree of Physical Solution.

At page 61 of petitioner City of Fresno's opening brief, petitioner stated "All Parties Requested That the District Court Make a Physical Solution". At pages 57 and 58 of the City of Fresno's reply brief in companion case No. 115, before this Court are to be found quotations from pleadings and statements of counsel for petitioning districts requesting the District Court to make a decree of physical solution in this case.

Nowhere in respondents' brief do respondents deny they requested the District Court to make a physical solution.

Neither do respondents deny that they joined with the State of California in putting a proposed plan of physical solution into evidence.

It must therefore be assumed that all respondents not only requested the District Court to make a physical solution but introduced one in evidence in this case.

2. That the District Court Had the Power to Make a Physical Solution.

In the first place it should again be pointed out that, as the Court below stated, the decree of physical solution was evolved by California Courts to aid appropriators of California waters like the United States —not to aid the riparian owners such as the petitioners herein.

> "The decree of physical solution *is not then a detriment imposed upon the Bureau. It is a grant of right to the Bureau;* and a detriment or limitation upon the rights of the plaintiffs to the full natural flow of the river. The judgment of the Bureau to accept the physical solution or, in the

alternative, to reject it and resort to condemnation remains available." (emphasis ours)

State of California, United States of America v. Rank, 293 F. 2d 340, 353 (1961).

As shown at page 24 of our opening brief, a decree of physical solution in this case would probably save the United States $100,000,000 since if this Court should reverse the finding of the District Court and the Court below that a decree of physical solution is proper under the alternative prayer of original plaintiffs complaint asking for damages in "inverse condemnation" in event their prayer for a physical solution is denied [R. 38] the District Court would of necessity have to determine damages for the destruction of the 100,000 acres of valuable Fresno County farm land it found would be destroyed [R. 938, Finding 26A] if the Court's plan of physical solution were not put into effect.

Even the Bureau officials and the Secretary of the Interior have requested a decree of physical solution in this case which in general agreed with the State of California's plan of physical solution. The State's plan of physical solution only varied from the District Court's plan in calling for a lesser number and different type of check dam than the Court decreed.

"We recommend that you affirm the principle of this plan for a physical solution, with the understanding that in the details of its execution it will be reconciled in so far as practicable with the plan filed by the State of California, and that you so inform the Attorney General."

R. 295, Deft. Ex. A-79-A. Signed: Douglas McKay, Secretary of the Interior, Rep. Tr. 21,975.

It is not the Bureau of Reclamation officials in this case who object to the money and water saving decree of physical solution but one of the Department of Justice's attorney, Mr. William Veeder, one of opposing counsel herein. Mr. Veeder first came into this case after the trial in the District Court against the Bureau officials had been concluded for all practical purposes and his efforts to destroy California's water rights have so displeased Congress in the past that Congress, like they did in the case of Richard Boke, stopped his salary in another California case involving the rights of the United States to a California stream until he quit his attacks on California water rights.[1]

At pages 63 to 67 of petitioner City of Fresno's opening brief, authorities are cited showing that this Court has approved decrees of physical solution on many occasions. This contention also was not denied by the respondents anywhere in their brief nor in their brief filed as petitioners in companion case No. 115 before this Court.

We again state the position of this Court on decrees of physical solution, a case involving the operation by

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3) In the Act of July 10, 1952, an appropriation bill, the Congress prohibited the use of Department of Justice funds for the preparation of prosecution of this litigation, Act of July 10, 1952, Sec. 208(d), 66 Stat. 560." Sec. (d) None of the funds appropriated by this title may be used in the preparation or prosecution of the suit in the United States District Court for the Southern District of California, Southern Division, by the United States of America against Fallbrook Public Utility District, a public service corporation of the State of California, and others.

United States v. Fallbrook, 165 F. Supp. 806, 846 (1958).

the Bureau of Reclamation of the San Joaquin River under the Central Valley Project.

> "* * * If * * * one seeks to appropriate the water wasted or not put to any beneficial use, *it is obligatory that he find some physical solution, at his expense*, to preserve existing prior rights, or if this cannot be done, and the water is to be appropriated, nonetheless, under the right of eminent domain, the riparian owners, prior appropriators and overlying landowners must be compensated for the value of the rights taken. Peabody v. City of Vallejo, 2 Cal. 2d 351, 40 P. 2d 486; City of Lodi v. East Bay Municipal Utility District, 7 Cal. 2d 316, 60 P. 2d 439; Hillside Water Co. v. City of Los Angeles, 10 Cal. 2d 677, 76 P. 2d 681; City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 52 P. 2d 585; Los Angeles Flood Control District v. Abbot, 24 Cal. App. 2d 728, 76 P. 2d 188." (emphasis ours)
>
> *Gerlach Live Stock Co. v. United States*, 111 Ct. Cls. 1, 81. Aff. 335 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

The Court of Appeals below has also upheld the power of the District Court to make a decree of physical solution herein in at least three cases.[2]

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[2] "The California Courts, confronted with the command of the 1928 Constitutional amendment that water should not be wasted, and also with the guaranties of that amendment that existing water rights be preserved to the extent of their present and prospective * * * decree which for the sake of convenience is called a 'physical solution.'

"'In essence, such decree is but the conditional injunctive decree of a court of equity. Such decrees in California water rights cases are characteristic examples of the preservation by equity courts of the elements and flexibility and expansiveness

It is therefore submitted that as far as the respondent districts are concerned they all admit that they requested a decree of physical solution, that they all joined with the State of California in submitting into evidence a plan of physical solution, consisting of several stationery check dams in the San Joaquin River between Friant and Gravelly Ford Canal, and that they at no time denied the District Court had the power to make a decree of physical solution.

3. That This Is Not a Suit Against the United States Insofar as the Determination of the Question of Whether the Rates Attempted to Be Charged the City of Fresno by Respondent Bureau of Reclamation Officials Are Unreasonable, Illegal, Arbitrary and in Excess of the Statutory Authority of Respondent Officials.

The District Court held that the United States although a necessary party to the doing of complete

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so that new remedies may be invented or old ones modified in order to meet the requirements of every case and to satisfy the needs of every progressive social condition.'"

State v. Rank, 293 F. 2d 340, 344 (1951).

"9. The term 'physical solution as used in California water law apparently contemplates a court-enforced plan for making as much water as possible available, through the construction of dams or canals or other physical or mechanical instruments, to all the lawful claimants of the waters in dispute. * * * See: Peabody v. City of Vallejo, 1935, 2 Cal. 2d 351, 40 P. 2d 486, 497; Rancho Santa Margarita v. Vail, 1938, 11 Cal. 2d 501, 81 P. 2d 533, 562; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 1935, 3 Cal. 2d 489, 575, 45 P. 2d 972; City of Lodi v. East Bay Municipal Utility District, 1936, 7 Cal. 2d 316, 341, 60 P. 2d 439. See also *Rank v. Krug*, D. C. S. C. Cal. 1950, 90 F. Supp. 773, 803."

State of California v. United States District Court, 213 F. 2d 818, 821 (Footnote 9) (9th Cir.) (1954).

"* * *. Perhaps some physical solution by or control under court decree could permit participation by all in the conservation of all flow of the watershed for beneficial use that no drop would waste uselessly into the Pacific."

People of State of California v. United States, 235 F. 2d 647, 662 (9th Cir.) (1956).

relief in this case was not an indispensable party so far as obtaining relief against the respondent officials was concerned.

> "The United States is a *necessary* party to the doing of complete relief, though it would not be an *indispensable* party to the obtaining of relief only against the defendant officials." (emphasis ours)
>
> *Kan* v. (Krug) United States*, 142 F. Supp. 1, 78 (1956).

The Court below partially affirmed this portion of the decision of the District Court holding that the United States was not an indispensable party so far as the District Court's plan of physical solution was concerned but was an indispensable party so far as obtaining water by the City was concerned. Respondent Districts, however, cite not one single authority backing this part of the decision of the Court below.

At page 94 of petitioners' opening brief in this action No. 51, petitioners cited decisions of this Court involving attempted illegal Bureau of Reclamation charges which held that the determination of the limits of statutory authority of federal officials is a judicial and not an administrative determination.

At page 98 of their brief, petitioners cite decisions of this Court and other federal courts that an action to determine whether water rates attempted to be charged by Bureau of Reclamation officials are unreasonable, illegal or arbitrary is not a suit against the United States. We now briefly again cite three decisions of this Court involving these two points and one of several decisions of the Courts of Appeals hold-

ing that such a suit as this is not an action against the United States.

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);

Yuma County Water Users' Ass'n v. Schlecht, 262 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909 (1922);

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937).

"* * *. The questions whether or not the *charges* alleged to be *illegal* and the acts and threatened acts of executive officers depriving the shareholders of a water users' association of water * * * are justified by law, are questions of law which a court of equity is empowered to determine in a suit of such an association against such executive officers, although the Secretary of the Interior or other executive officers have already decided them.

"3. United States—'Suit Against United States' Interference With Rights.

"A suit against executive officers of the United States to enjoin them from committing acts unauthorized by or in violation of law, to the irreparable injury of the property rights of the plaintiff, is not a '*suit against the United States*', nor is it or the injunction sought objectionable, either on the ground that they interfere with the property or the possession of the property of the United States. * * *." (emphasis ours)

Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 Fed. 72, 73 (8th Cir.) (1914).

Swigart v. Baker, supra, was a suit for an injunction by a member of an irrigation district which was supplied with water from the Sunnyside unit of the Yakima Irrigation Bureau of Reclamation Project in eastern Washington, against the local officials of the United States Bureau of Reclamation in regard to the reasonableness and legality of certain rates for water the Secretary of the Interior was charging. Neither the Secretary of the Interior nor the United States was a party. The District Court of eastern Washington ruled that this suit was not one against the United States. We quote:

> "(2) The respondents claim that this is, in effect, a suit against the government. If the position taken by the complainant is sound, and the respondents, without authority of law, are attempting to deprive him of rights accorded to him by the law, the claim that this is a suit against the government is utterly unfounded."
>
> *Baker v. Swigart*, 196 Fed. 569, 571 (1912).

This Court affirmed this judgment of the District Court in the above-entitled case, we quote:

> "The decree of the Circuit Court of Appeals is reversed, that of the District Court is affirmed, and the case remanded to the District Court."
>
> *Swigart v. Baker*, 229 U. S. 187, 33 S. Ct. 645, 648, 57 L. Ed. 1143 (1912).

Yuma County Water Users' Ass'n v. Schlecht, supra, was a suit for an injunction by owners of tracts of land in the Bureau of Reclamation's Yuma Irrigation Project *against "local officials* of the Yuma Project of United States Reclamation Service." (*Yuma County*

Water Users' Ass'n v. Schlecht, 275 Fed. 885 (9th Cir.) (1921), to determine the legality and reasonableness of water rates under the project. The United States was not a party.

As shown in all of the above suits, the reasonableness and legality of water charges by Bureau of Reclamation officials under Reclamation Projects was decided *and in none of the above* decisions *of this Court was the United States a party.*

Nowhere in respondents' brief did respondents attempt to distinguish the above cases, nor do we believe they can distinguish them.

4. That the United States Must Proceed in Construction and Operation of the Central Valley Project in Accordance With California County of Origin and Watershed of Origin Statutes and Congressional Acts Giving Priority to Counties and Areas of Origin.

At pages 137 to 151 the petitioners in their opening brief cited in support of their position that the respondent Bureau of Reclamation officials must obey California County of Origin and Watershed protective acts, among other things, representations by the respondent Bureau of Reclamation officials that they were obliged to proceed in conformity with California's County of Origin and Watershed of Origin protective statutes.[3]

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[3]"66. In addition to respecting all existing water rights, the *Bureau* in this report has complied with *California's County of Origin legislation*, which requires that water shall be reserved *for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus waters will be exported elsewhere.*" (emphasis ours)

Senate Document 113, 81st Congress, page 65, Pltf. Ex. 136, R. 2285.

the opinions of the Attorney General of California,[4] the opinion of the California Water Rights Board[5] and

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[4]"The opinions of the State Attorney General mentioned above declare that both the State and Federal Government in the operation of the CVP are subject to the *restrictions* of the County or Origin Law and the Watershed Protection Act." (emphasis ours)

Central Valley Project Documents, 85th Congress, 1st Session, House Document No. 246, 516 (1956).

"(2) In the circumstances specified in the statute, Water Code Sections 10505 and 11460 would require that *water* which had been put to use in the operation of the Central Valley Project in areas outside the county of origin, or the watershed of origin and areas immediately adjacent thereto, be withdrawn from such outside areas and made available for use in the specified area of origin.

"(3) Water Code Sections 11460 and 11463 are applicable to the United States in its operation of the Central Valley Project * * *."

25 Opinions, Attorney General p. 9 (1955).

"From what has already been said, it follows that the interim use of water reserved for counties of origin under section 10505, or for watersheds of origin under section 11460 and 11463 is subject to termination whenever such water becomes necessary for development of such areas of preference and proper applications to appropriate the water for use therein are filed and granted. In such case *there would be no right of reimbursement for the project works* which had been used for the interim use of the water exported." (emphasis ours)

25 Opinions, Attorney General p. 27 (1955).

"The legislative background of the priority makes it difficult to conceive that the Legislature intended that the authority could destroy the priority be condemnation. Since the priority exists only as against the authority, such a construction would completely destroy the effect of Section 11460 and make its enactment an idle gesture."

25 Opinions, Attorney General p. 21 (1955).

[5]"* * * as a matter of both state and federal law, it appears that the United States, the Bureau of Reclamation as well as its parent organization, the Department of the Interior and the Secretary thereof, are obligated to observe Water Code Sections 11460-11463, in carrying out the Central Valley Project."

State Water Rights Board of the State of California, Decision No. D-935, Adopted June 2, 1959, p. 100.

"* * *. Whatever may have been the intent of the Legislature in adopting these statutes we cannot conclude that it was intended thereby to deprive areas such as the City of Fresno

even the specific act of Congress requiring the respondent Bureau officials to act in accordance with California County and Watershed of Origin protective laws.[6]

Nowhere in respondents' brief is there any attempt to answer petitioners' position that Respondent Bureau officials are bound by California's county of origin and watershed of origin protective acts in the operation of the Central Valley Project. It is obvious that petitioners cannot and do not deny that the Respondent Bureau officials are bound by California's county of origin and watershed of origin protective statutes in its operation of the Central Valley Project.

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and the Fresno Irrigation District of a source of water supply so readily accessible to them as that obtainable from the San Joaquin River. * * * we believe that *the Legislature in adopting 'Watershed Protection' Sections 11460-11463 and 'County of Origin' Sections 10500, 10501 and 10505, was expressing a policy that areas such as the City and the District, both highly developed and well established, located almost at the very outlet-works of Friant Dam should not incur deficiencies in supply such as they are now suffering while water is transported past them to distant undeveloped lands.*" (emphasis ours)

State Water Rights Board of the State of California, Decision No. D-935, Adopted June 2, 1959, p. 72.

[6] "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, that the Central Valley Project, California, authorized by section 2 of the Act of Congress of August 26, 1937 (50 Stat. 850), is hereby *reauthorized* * * *.

"Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS, GIVING PRIORITY TO COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)

Act of October 14, 1949, 63 Stat. 852, 853.

In fact it would be impossible for opposing counsel, Adolph Moskovitz, who is the principal writer of respondents' brief to deny that such is the law, for he himself was one of the authors of the opinions of the Attorney General of the State of California, holding that the United States in the operation of the Central Valley Project is bound by California's County of Origin and Watershed of Origin protective statutes as shown by the following:

> "Opinion by: Edmund G. Brown, Attorney General, Adolphus Moskovitz, Deputy."
>
> 25 Opinions, Attorney General p. 1 (1955).

Like a certain prominent dictator's remarks on Berlin, we feel that this article must truly be a 'bone in the throat' of opposing counsel.

It will be noted that nowhere in respondent districts' brief was there any attempt to urge that the Act of October 14, 1949, was not controlling here. Other authorities to the effect that the United States is required to conform to California's County of Origin and Watershed of Origin protective statutes are to be found at pages 145 through 152 of petitioners' opening brief in this case.

As will later be shown, opposing counsel seeks to avoid the effect of the effect of the undisputed laws protecting counties and watersheds of origin by raising immaterial issues which they did not raise in their petition for certiorari and which therefore should not now be considered by this Court.

5. The County of Origin and Watershed of Origin Protective Rights May Not Be Taken by Eminent Domain.

Both the Act of October 14, 1949, 63 Stat. 852, 853 and the following opinion of the Attorney General of California clearly show that water to which California counties and areas of origin are entitled may not be taken by eminent domain or condemnation.

> "The legislative background of the priority makes it difficult to conceive that the Legislature intended that the authority could destroy the priority by condemnation. Since the priority exists only as against the authority, such a construction would completely destroy the effect of Section 11460 and make its enactment an idle gesture."
>
> 25 Opinions, Attorney General, p. 21 (1955).

The efforts of respondent officials to put their plan of physical solution into force by contracts with some of the riparian owners between Friant Dam and Gravelly Ford Canal also negative any authorization by Congress to take these rights.

> "* * *. The fact alleged in the petition that at some time in 1919 the War Department *offered to purchase part* of this land for the fire control station — perhaps only a few square feet, or a rod, out of a 200-acre tract—when considered in connection with the other facts stated, serves not to prove, but to negative, authorization to make the taking asserted in this suit." (emphasis ours)
>
> *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U. S. 327, 339, 43 S. Ct. 135, 140, 67 L. Ed. 287 (1922).

6. The Determination of the Amonut of Water a County or Watershed of Origin is Entitled to Is a Judicial Not an Administrative Decision.

It having been conclusively shown that both petitioner, City of Fresno and the riparian owners between Friant Dam and Gravelly Ford Canal are entitled to have all necessary water reserved for them to supply their present and future needs and that said rights may not be taken by eminent domain, we submit the determination of the amount of water to which their rights entitle them to is a judicial and not an administrative decision.

> "* * * what is a useful and beneficial purpose, and what is an unreasonable use is a judicial question depending upon the facts in each case. Likewise, what is a reasonable or unreasonable use of water is a judicial question *to be determined in the first instance by the Court.*" (emphasis ours)
>
> *Gin S. Chow v. City of Santa Barbara*, 217 C. 673, 706, 22 P. 2d 5 (1933).

B. Respondents Attempt to Raise Issues in This Brief Not Raised in Their Petition for Certiorari.

Respondents in order to attempt to avoid the law that the Bureau of Reclamation officials must conform to the California county and watershed of origin protective acts and the Act of Congress of October 14, 1949, 63 Stat. 852, 853, as shown in the preceding chapter for the first time in their reply brief in this case attempt to raise a new issue in their brief, viz, that respondent districts in Kern and Tulare Counties are in the watershed of the San Joaquin River within the meaning of the county of origin and watershed of origin protective

statutes of the State of California. Such contention is not only without merit but since no such question was set forth in their petition for certiorari,[7] under the rules of this Court it should not now be considered.

> "The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari but the brief may not raise additional questions or

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[7]The questions presented in the districts' petition for certiorari did not include any contention that the petitioning districts were in the watershed of the San Joaquin River. In fact the entire case was tried under the theory that they were in the watershed of the San Joaquin River. As shown by the following questions presented by the petition for certiorari of all respondent districts filed in Case No. 966, October Term, 1961:

"1. Whether the operation by federal officials of a federal reclamation project and their notification of intent with respect thereto resulted in an authorized taking by physical seizure of vested water rights * * *.

"2. Whether the districts should not be dismissed in an action to enjoin the alleged illegal interference with vested water rights * * * where the districts make no claim on their own behalf to the plaintiffs alleged rights.

"3. Adopt and incorporate by reference the question presented on page 2 of petition for writ of certiorari filed by Solicitor General in Dugan v. Rank, October Term 1961 No. 366."

Districts' Petition for Certiorari, Case No. 966, October Term 1961, pages 3-4.

Neither was such a question raised in the petition of Attorney General for certiorari.

"1. Whether a United States district court is empowered by injunctive orders directed to subordinate officials of the Bureau of Reclamation to effect a continuing regulation of a federal reclamation project.

"2. Whether the operation of a federal reclamation project in such a way as * * * to interfere with landowners enjoyment of water rights * * * should be treated as a taking by eminent domain.

"3. Whether a suit against officials of the Bureau of Reclamation * * * is in fact a suit against the United States."

Solicitor General's Petition for Certiorari, Case No. 366, October Term 1961, page 2.

change the substance of the questions already presented in those documents." (emphasis ours)

Federal Practice and Procedure Rules Ed., Barron and Holtzoff-Wright, Vol. 3A, pp. 1539 (1958).

However, although the question is not properly before this Court and without waiving our objection on that ground, we will briefly comment on this erroneous contention of respondents. The District Court held that the watershed of the San Joaquin River was located entirely in the Counties of Fresno and Madera and that none of the respondent districts served by the Friant-Kern Canal were located in the watershed of the San Joaquin River.

"The watershed of the San Joaquin River is located entirely in the County of Fresno and Madera."

Rank v. (Krug) United States, 142 F. Supp. 1, 153 (1956).

"The area of all the irrigation districts served by the Friant-Kern Canal are located in counties other than either Madera or Fresno."

Rank v. (Krug) United States, 142 F. Supp. 1, 153 (1956).

Referring to the Tule, Kern and Kaweah Rivers the District Court held they had their own separate watersheds separate from the San Joaquin.

"Each of the above-named river systems has a separate well-defined watershed area * * *. Each is a separate river and river system, and has been historically known as such."

Rank v. (Krug) United States, 142 F. Supp. 1, 43-44 (1956).

The holding of the District Court was upheld by the Court below.[8]

> "Save in the respects here specified the judgment of the District Court is affirmed."
>
> *State of California, United States of America v. Rank*, 293 F. 2d 340, 351 (1961).

Respondents in their petitions for certiorari did not contend these rulings of the District Court were erroneous. They must therefore stand.

Without waiving our objection to respondents raising issues not raised in their petitions for certiorari we will briefly show that the contention of respondents is incorrect.

Respondents base their contention upon some erroneous dicta of the District Court quoted in footnote 15 at page 32 of their reply brief referring to erroneous statements of the District Court in regard to alleged overflows of the Kern River into the San Joaquin, which the evidence in this case conclusively showed were overflows (if they ever occurred) *caused by* artificial *changes only* and could therefore not affect the determination of what constituted the natural watershed of any river.

As the District Court clearly states the waters that we are concerned with here are those waters originating in a distinct watershed above the junction of Fresno

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[8]The District Court was clearly in error in its statement that the San Joaquin backed into Tulare Lake. The lowest outlet from Tulare Lake is Summit Lake with an elevation above sea level of 205 feet. (Burrel Quadrangle, U. S. G. S.) (1950). Whereas the top of Mendota Pool has an elevation of 158 feet above sea level (Mendota Quadrangle, U. S. G. S.) (1946). In other words, to back water into Tulare Lake the depth of the San Joaquin at top of Mendota Dam unsupported by any dam would be 47 feet above the top of Mendota Dam—an impossibility.

Slough and Mendota, where the artificial seepage was supposed to enter the San Joaquin.

> "We are concerned here only with the waters of the San Joaquin river as they flow southwesterly from the mountains to Mendota."
>
> *Rank v. (Krug) United States,* 142 F. Supp. 1, 44 (1956).

Respondents' Documents Cited in Their Reply Brief Show That Any Water of the Kern River Caused to Flow Into Tulare Lake or Tulare Lake to Flow Out of Its Basin Was Done by Artificial Levies and Artificial Channels.

Respondent districts in their brief quote with approval California Division of Water Resources Bulletin 29, San Joaquin Basin (1931). This document itself conclusively proves that there was never a natural flow from the Kern River into Buena Vista Lake and thence into Tulare Lake. We quote:

> "Immediately south of the San Joaquin River is *a natural ridge or barrier formed by the Kings river Delta on the east side of the valley trough and to a minor extent from Panoche Creek on the west.* In the depression south of the ridge is Tulare Lake which flows north through Fresno Slough to the San Joaquin River and part south to Tulare Lake. In its natural conditions Tulare Lake covered an area varying from a few square miles in dry cycles to about 700 square miles in wet ones. Reclamation by levies now restricts the submerged area to smaller tracts under normal run-off conditions. South of Kern River Delta a similar shallow but smaller lake stores surplus waters of the Kern River. *The area of the lake also has*

been restricted by levies which cause excess water to drain north to Tulare Lake through an artificially deepened and levied channel." (emphasis ours)

Bulletin 29, Division of Water Resources, page 75.

In other words, as shown by the above quotation relied upon by respondents, both Tulare Lake and Buena Vista Lake have been artificially restricted by levies and a channel artificially deepened and levied from Buena Vista Lake to Tulare Lake in order to force Kern River flood waters into Tulare Lake, and that these two artificial changes, not a natural flow of the Kern River, caused Kern River waters to drain north to Tulare Lake. We quote these two pertinent facts from the above Bulletin: (1) "levies which cause excess water to drain north to Tulare Lake" and (2) through "an artificially deepened and levied channel".

2. The Two Documents Cited by Respondents as Showing the Kern River Ever Drained Into the San Joaquin River Do Not Sustain in Any Way, Nor State, the Kern River Ever Flowed Into the San Joaquin.

Contrary to the statement in the footnote cited at page 32 of respondents' brief, the old documents, namely, California Conservation Committee Report 202 (1912), reprinted 3 Appendix to Journals of California Senate & Assembly, 40th Session (1913), nowhere state that *either the Kern, Tule or Kaweah Rivers, Buena Vista Lake or Tulare Lake ever drained into the San Joaquin River.* At most they state that Tulare Lake overflowed, but they do not state they overflowed into the San Joaquin River even after the artificial changes mentioned in Bulletin 29, *supra.*

3. The Watersheds of the Kern, Tule and Kaweah Rivers Are All Located in Tulare and Kern Counties, Not in Fresno County, as Shown by Respondents' Own Documents.

Even the documents relied upon by respondents—namely, Bulletin 29 of the Division of Water Resources of the State of California—disproves the position of respondents and proves that the watersheds of the Kern, Tule and Kaweah Rivers lie entirely in Kern and Tulare Counties.

The California Legislature before adopting the Central Valley Project or submitting it to the people and prior to adopting the protective statutes for counties and areas of origin under the Central Valley Project, authorized the California Division of Water Resources to determine the location of the watersheds of the various streams in the area. This report given under authority of the Legislature and[9] relied upon extensively by respondents conclusively shows that the watersheds of Kern, Tule and Kaweah Rivers are distinct from the San Joaquin and lie in Kern and Tulare Counties—not Fresno County.

> "The Kern River is the most southerly of the large streams rising in the Sierra Nevada and discharging into the San Joaquin Valley. Its watershed is situated in *Kern and Tulare Counties.*" (emphasis ours)
>
> Bulletin 29, Division of Water Resources, page 74.

> "The *Kaweah* River drains a watershed on the western slope of the Sierra Nevada in *Tulare County*. * * *.

[9]Chapter 832, Statutes of 1929, California Legislature.

> "The Tule River drains a small and somewhat rectangular area on the lower western slope of the Sierra Nevada lying south of the Kaweah River Basin, west of the Kern River Basin and north of the Deer Creek Basin. (emphasis ours)
>
> Bulletin 29, Division of Water Resources, pages 73-74.

The documents relied upon by respondents therefore conclusively show that none of the rivers in either Tulare or Kern Counties, in which counties lie the respondent districts served by the Friant-Kern Canal, ever emptied their waters *naturally* in the *course of nature* into the San Joaquin River, but from time immemorial emptied their waters into either Tulare Lake or Buena Vista Lake.

4. Moreover, Under the Law Watersheds of a Tributary Stream Upstream From Its Junction With a River Is Not the Watershed of the River.

The authorities are clear that even if we assume that the rivers in Tulare and Kern Counties known as the Tulare, Kaweah and Kern Rivers ever in the course of nature flowed into the San Joaquin or could be considered tributaries of the San Joaquin River, which they did not, nevertheless by the unanimous weight of the authorities the watershed of a tributary are not the watershed of a river above its junction with the river.

> "The Ramapo river is a tributory and not a branch (as was suggested in the argument) of the Passaic river. As a tributary it is an independent stream, having its own separate watersheds. * * *. It does not follow as a logical sequence, because of that fact, that these rivers lose their identity as independent streams, and

that thereby their watersheds are those of the Passaic any more than it would follow that the Passaic watersheds were also the watersheds of those rivers emptying into the Passaic river."

Borough of Oakland v. Board of Conservation and Development of New Jersey, 122 A. 311, 313 (1923).[18]

"* * * *Tributary of river held a watershed different from that of the river, within statute as to obtaining additional water from other watershed; 'watershed other than that of the river.'*" (Syllabus)

Borough of Oakland v. Board of Conservation and Development of New Jersey, 122 A. 311 (1923):

"Sec. 82. *Forks of Stream.*—When two streams unite and form a single watercourse, *lands above the junction are to be considered riparian only to the particular fork in the watershed of which they are located.* The fact that the streams are of different size, or that both lie in one general watershed or drainage basin does not affect the rule; nor is it material that the two watersheds are separated merely by a comparatively low table-land or mesa. * * *."

25 Cal. Jur. 1080-1081.

Anaheim Union Water Co. v. Fuller, 150 C. 327, 330, 11 L.R.A. (N.S.) 1062, 88 P. 978 (1907).

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[18]It will be remembered that in California and other states where the doctrine of riparian rights is recognized riparian land must meet two requirements. First, it must abut on the stream, and Second, it must be in the watershed of the stream.

5. The California Supreme Court Has Held That the San Joaquin River Originates in Fresno and Madera Counties.

If further discussion were needed we point out that the Supreme Court of California has held that the San Joaquin River originates in Fresno and Madera Counties, not in Tulare or Kern Counties.

> "* * *. The San Joaquin River is a natural water course arising in the Sierra Nevada in *Fresno* and Madera Counties." (emphasis ours)
>
> *Meridian, Ltd. v. San Francisco*, 13 C. 2d 424, 429, 90 P. 2d 537, 91 P. 2d 105 (1939).

Moreover, the water involved *in this action* is all water that originates in the Counties of Fresno and Madera and which passes Friant Dam fifty miles upstream from the junction of Fresno Slough where respondents claim some artificially created flood waters drained from Tulare and Kern Counties into Fresno Slough.

If further proof were needed that the respondent districts served by the Kern Canal are not within the watershed of the San Joaquin and that none of the waters of the Kern, Tule or Kaweah Rivers drain into the San Joaquin, it appears from the decision of the California Water Rights Board interpreting what is meant by the San Joaquin watershed under the California watershed protective statute.[11]

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[11] "*Major tributaries* draining the Sierras and contributing to the San Joaquin River on its northward journey from Mendota Pool are the Fresno, Merced, Tuolomne, Stanislaus and Calaveras Rivers. Intermittent contributions of minor magnitude are made to the San Joaquin River downstream from Mendota Pool by watercourses draining the easterly slope of the Coast Range plus return irrigation water from areas served by the Delta-Mendota

The above finding of the California Water Rights Board clearly negatives that there is, or ever was, a natural channel from the Kern, Tule or Kaweah Rivers to the San Joaquin River and clearly holds that none of the districts taking water from the Friant-Kern Canal are in the watershed of the San Joaquin River. All of the districts took part in this decision and did not appeal therefrom.

6. Irrespective of the Watershed Protective Law and Whether the Tule River and Kaweah Rivers Have Their Own Separate Watersheds, Petitioner Is Still Entitled to Protection Under California's County of Origin Law and the Act of October 14, 1949, 63 Stat. 852-853.

All of the above discussion has to do with California's *watershed protective act. Irrespective of this act petitioner City of Fresno and other former plaintiffs are protected by the fact that they are in the county of origin*[12] and thegefore protected by the California county of origin laws and the Act of October 14, 1949, 63 Stat. 852-853,[13] irrespective of *California's* watershed of origin protective statute.

Canal of the United States and by the Merced Irrigation District. "Of primary concern is the watershed area of about 1,633 square miles above the valley floor controlled by Friant Dam. All of this portion of the San Joaquin River watershed is located *within Fresno and Madera Counties and is bounded on the north by the watersheds* of the Merced and Fresno Rivers and on the south by that of the Kings River."

State of California Water Rights Board Decision D 935.

[12]"* * *. The San Joaquin River is a natural water course arising in the Sierra-Nevada in *Fresno* and Madera Counties." (emphasis ours)

Meridian, Ltd. v. San Francisco, 13 C. 2d 424, 429, 90 P. 2d 537, 91 P. 2d 105 (1939).

[13]"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF

C. Other Erroneous Contentions and Statements of Fact of Respondents' Brief Pointed Out.

1. Respondents' Statement Appearing at Page 11 of Their Brief to the Effect That the Feasibility Report of 1935 Did Not Support the City's Contention Is Incorrect.

The petitioner, City of Fresno, in its opening brief, stated that the Feasibility Report of 1935 stated "no new lands were to be brought into cultivation by the project." Respondents in their brief say that this statement of petitioner, City of Fresno, is incorrect. This statement of respondent districts, however, is incorrect and inaccurate. We quote from the Feasibility Report:

> "The Project will not bring into production new agricultural areas." (emphasis ours)
>
> Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935, p. 1, Appendix "D" petitioners' opening brief.

Moreover, even petitioners in their brief do not dispute that the plan provided water for domestic and municipal purposes.

AMERICA IN CONGRESS ASSEMBLED, that the Central Valley Project, California, authorized by section 2 of the Act of Congress of August 26, 1937 (50 Stat. 850), is hereby reauthorized * * *.

"Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)

Act of October 14, 1949, 63 Stat. 852, 853.

"The Central Valley Project embodies a plan * * *, to provide urgently needed water supplies for existing * * * *industrial and municipal* developments in the Sacramento and San Joaquin Valleys and upper San Francisco Bay region * * *." (emphasis ours)

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935, Appendix "D" petitioners' opening brief.

"The Central Valley basin development * * * includes * * * water * * * for *municipal* and miscellaneous purposes including *cities* * * *." (emphasis ours)

United States v. Gerlach Live Stock Co., 339 U. S. 725, 733, 70 S. Ct. 955, 959, 94 L. Ed. 1231 (1950).

"The object of the plan is to arrest the flow and regulation its seasonal and year to year variations thereby creating salinity control to avoid the gradual encroachment of ocean water, providing an adequate supply * * * for *municipal* and irrigation purposes." (emphasis ours)

Ivanhoe Irrigation District v. McCracken, 357 U. S. 275, 281, 78 S. Ct. 1174, 1179, 2 L. Ed. 2d 1313 (1958).

2. The Implied Contention of Respondents That the Central Valley Project Will "Dry Up the River Below Friant" Is Untrue and Incorrect.

At pages 17 to 20 of respondents' brief the Court of Claims case of *Gerlach Live Stock Co. v. United States*, 111 Ct. Cls. 1, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950), is used to infer that the Central Valley Project "will dry up the river below Friant" and that the riparian owners between Friant and Gravelly Ford will not retain their riparian and overlying water rights. This is incorrect as will be shown even from the statements of opposing counsel in this case.

In the first place *Gerlach Live Stock Co. v. United States, supra*, dealt only with the taking of rights to the overflow of wild flood waters on uncultivated natural grasslands. These lands are shown on Exhibit II of petitioners' opening brief at page 15 thereof. This map as heretofore stated was prepared by the United States Bureau of Reclamation and used by the District Court in its decision in this case. (*Rank v. (Krug) United States*, 142 F. Supp. 1, 39 (1956).) As shown by that map these lands are many miles downstream from Gravelly Ford Canal and many miles downstream from where the Delta-Mendota Canal will replace the waters taken from the San Joaquin River with substitute waters of the Sacramento River.

That the *Gerlach Case* involves simply the overflow waters of the San Joaquin River[14] on grasslands

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[14] *The Gerlach Decision.* Logically and geographically the recent *Gerlach* decision of the United States Supreme Court, which affirmed six judgments of the Court of Claims against the United States, should be considered under the preceding heading.

many miles below the lands of the original plaintiffs in this action appears from 38 California Law Review article 572-600, which article is quoted profusely by opposing counsel in their brief on certiorari in companion Case No. 115, October Term of this Court, page 4.

Water formerly used for crops, however, was still to be supplied either by allowing the flow between Friant Dam and Gravelly Ford Canal or replacement of the same.

> "the plan as originally adopted and as carried out by the Bureau included replacement of all water * * * *formerly used for crops* * * *." (emphasis ours)
>
> *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 740, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

Moreover, the latest decision of the United States Court of Claims shows that the riparian landowners between Friant Dam and Gravelly Ford Canal were to be supplied.

> "The plan has been altered in a number of respects since there has been approved by the President * * *.
>
> "9. (a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River originative above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from

since it arose out of the use of the overflow of the San Joaquin River on grasslands."
38 California Law Review, p. 600.

Friant which would be for one or more of three purposes: (1) *to satisfy riparian rights between Friant and Gravelly Ford;* * * *." (emphasis ours)

Wolfsen v. United States, 162 F. Supp. 403, 411 (1958).

Even former opposing counsel Graham in the United States District Court in his law review article which has been quoted on numerous occasions by opposing counsel in this case admits that the San Joaquin River was not to be dried up.[15]

Finally, this same former opposing counsel in the article quoted with approval by opposing counsel now before this Court frankly admits that the Friant to Gravelly Ford water users will be provided for.

"There are approximately 230 small land holdings on the 37-mile reach of the river immediately below Friant Dam and extending to a point slightly below the Gravelly Ford Canal. *It is planned to leave an adequate water supply in the river throughout this area,* so that irrigation may be continued upon a basis consistent with reasonable use by all water users." (emphasis ours)

38 California Law Review 598.

This fact also clearly appears from the written contracts signed by the United States with many of the riparian landowners between Friant Dam and Gravelly Ford Canal and referred to in the law review article cited by opposing counsel.

"* * *. 'The United States recognizes that the Contracting Owners have certain rights to the use

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[15] "* * * the operation of Friant Reservoir will not 'dry up' the San Joaquin River."
38 California Law Review 599.

of water from, or influenced by, the River on or in connection with said land, either by appropriation, or by prescription, or as owners of land overlying an underground water supply whether from an underground stream or from percolating water, or as owners of land riparian to the River, or otherwise, and in full satisfaction of said water rights howsoever acquired, claimed, or enjoyed the United States will permit water to pass by or through Friant Dam into the River, which water, together with accretions to the River from all sources whatsoever, will maintain a live stream in the River at the control point hereinafter defined.'"

Def. Ex. A-48-A

Such contract negotiations negative any authority to take these rights by eminent domain.

"* * *. The fact alleged in the petition that at some time in 1919 the War Department offered to purchase part of this land for the fire control station—perhaps only a few square feet, or a rood, out of a 200-acre tract—when considered in connection with the other facts stated, serves not to prove, but to negative, authorization to make the taking asserted in this suit."

Portsmouth Harbor Land & Hotel Co. v. United States, 260 U. S. 327, 339, 43 S. Ct. 135, 140, 67 L. Ed. 287 (1922).

That the river was *not* to be dried up below Friant Dam also appeafs from respondent Bureau of Reclamations' representations to Congress.

"There are certain existing rights downstream from Friant which have to be supplied. Including

the riparian rights on the river between Friant Dam and Mendota Pool, water needed for preservation of fish life and waterfowl, and losses from evaporation and seepage in the reservoirs and canals, it has been determined that 150,000 acre-feet of Class I water must be reserved to meet those requirements." (emphasis ours)

R. 2284, Pltf. Ex. 121, Testimony of U.S.B.R. Engineer Stoner on Hearings before a Subcommittee of the Committee on Public Lands, United States Senate, 80th Congress, 1st Session on S912, page 708, Rep. Tr. 3072.

If any other proof were needed that the Central Valley Project provides water for the riparian landowners between Friant and Gravelly Ford Canal, the admission in the answer of the Bureau of Reclamation officials alone *conclusively* shows that their rights were not to be impaired.

"* * * allege *the plan of the Central Valley Project, approved by the Congress* * * *, as it affects the San Joaquin River between Friant Dam constructed, owned and operated by the United States, and Gravelly Ford, a point approximately thirty seven miles westerly thereof, *requires the Bureau of Reclamation to, and it will recognize and respect existing water rights of all riparian owners, including such of the plaintiffs, if any, as are riparian owners on the San Joaquin River between Friant Dam and Gravelly Ford, as they exist under the laws of the State of California* and which have not heretofore been acquired or adjusted by the United States. In order to accomplish this purpose, that is to say, to give that

recognition to those rights which the laws of California require, *it is the plan, purpose and intention of the Bureau of Reclamation to release at Friant Dam into the bed of the river a sufficient quantity of water so as to enable said riparian owners between Friant Dam and Gravelly Ford to divert from the stream and to make reasonable beneficial use, by using reasonable methods of diversion and reasonable methods of use and purpose, the waters required for irrigation and domestic use,* and in addition thereto to maintain a live stream in the river of not less than five second feet at Gravelly Ford." (emphasis ours)

R. 140,141. Answer of petitioners to Complaint.

"3. That *this Honorable Court determine* which lands described in plaintiffs' complaint on file herein *have their underground water strata charged and recharged from the San Joaquin River.*

* * *

"5. That this Honorable Court determine and adjudge that a live stream shall be maintained at all times between Friant Dam and Gravelly Ford on said San Joaquin River, *which said live stream shall at no time be required to be in excess of the natural flow of the San Joaquin River* if Friant dam were not constructed and in operation, which said live stream shall be for the purpose of supplying the said quantity of water for use upon lands riparian to said San Joaquin River *and to supply the underground percolating waters for lands determined to be entitled to a recharge from the San Joaquin River for said underground waters.*" (emphasis ours)

R. 146, 147. Answer of petitioners to Complaint.

3. Moreover, the Determination of the Amount of Water Riparian Owners Are Entitled to Between Friant Dam and Gravelly Ford Canal Is a Judicial Determination.

It having been shown that riparian owners between Friant Dam and Gravelly Ford Canal were to have their riparian rights supplied under the Central Valley Project under the law, it is clear that the determination of the amount of water to which they were entitled under these rights is a judicial and not an administrative determination.

> "What is a useful and beneficial purpose, and what is an unreasonable use is a judicial question depending upon the facts in each case. Likewise, what is a reasonable or unreasonable use of water is a judicial question *to be determined in the first instance* by the Court." (emphasis ours)
>
> *Gin S. Chow v. City of Santa Barbara*, 217 C. 673, 22 P. 2d 5 (1933).

Finally these landowners are in the county of origin and watershed of origin of the San Joaquin River and are protected by the Act of Congress of October 14, 1949, 63 Stat. 852-853.

> "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, * * *.
>
> "* * * the Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO THE COUNTIES AND AREA OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)
>
> Act of October 14, 1949, 63 Stat. 852, 853.

4. Claim of Respondents That Certain Documents Prepared and Published by the State of California Before the People of the State of California Adopted the Central Valley Project and Prior to Changes Made in the Central Valley Plan by Congress Indicate That Riparian Rights Below Friant Dam Were Not to Be Recognized Is so Erroneous as to Be Unworthy of Comment.

Opposing counsel at pages 13 through 16 of their brief filed in this case intimate that certain state documents indicate that riparian rights between Friant Dam and Gravelly Ford Canal were to be taken is inaccurate and misleading. Respondents rely upon two documents —Bulletins 25 and 29 of the Division of Water Resources.

However, the plan set forth in these documents was not adopted by the United States Bureau of Reclamation. The State plan provided only for a dam at Friant 250 feet high. The dam finally built as a federal project was 320 feet high and had a storage capactiy of 520,000 acre-feet, thereby increasing the amount of water which would be available from storage.

The State plan also contemplated making the San Joaquin River navigable to Mendota by means of dams in the channel of the river, pumping stations and a certain amount of channelization. This plan has been replaced by the Delta-Mendota Canal and Tracy Pumping Station, whereby water is lifted several hundred feet above the delta of the San Joaquin River transported by gravity back to a point just above Mendota Dam where it fills the pool formerly maintained by the San Joaquin River backing up the water fourteen miles upstream from Mendota Dam to a point just below the

Gravelly Ford Canal. Riparian lands between Friant and Gravelly Ford were to be supplied.

> "9.(a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River originating above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from Friant which would be for one or more of three purposes: (1) *to satisfy riparian rights between Friant and Gravelly* Ford: * * *." (emphasis ours)
>
> *Wolfsen v. United States*, 162 F. Supp. 403, 411 (1958).

As shown in the preceding paragraph the riparian and overlying landowners between Friant Dam and Gravelly Ford were to receive all water to which they were entitled.

(a) *The Powerhouse at Friant.*

This is another immaterial issue. Opposing counsel refers to a powerhouse at Friant as only one powerhouse. This issue is really too immaterial for comment. However, the fact is that there were to be *two* power plants at Friant, one of which was not to be eliminated. The State plan included one at the bottom of the river and one in the bottom of the Madera Canal[16] outlet, which could be used to generate power by discharging the water into the bottom of the Madera Canal or by dumping it into the river when not furnishing water to the Madera Canal.

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[16]Bulletin 29, State of California Department of Public Works (1931) p. 59.

Suffice it to say that both of these power generation plants were eliminated before the original plan of feasibility of 1935 was adopted due to public utility opposition and the cooperation between the State engineer who drew up said bulletins and who without authority from the California Water Project Authority eliminated the power plant feature from California's application. Without going into the merits of public versus private ownership of power sites it may be stated that this engineer had long been spokesman for the private power interest in California and the California Water Project Authority complained publicly that he had amended their application for Water Project Authority funds without their consent so as to eliminate any power generation at Friant Dam. This appears in many newspaper dispatches of the time. The members of the House Public Lands Committee of Congress announced publicly that members of the California Water Commission had stated to them that Hyatt, who was one of the main originators of Bulletin 29, amended the application for W. P. A. funds by eliminating the power features of Friant Dam without the knowledge of the members of the California Water Authority.

Respondents' statement that Congress did not favor water for the area between Friant Dam and Gravelly Ford is entirely erroneous and unfounded. Respondents

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"* * * A combination of private utilities, in which Pacific Gas and Electric Company perhaps was the most active participant and principal contributor, successfully opposed the Water and Power Act submitted to the California voters by referendum in 1922. The State's Central Valley Project Act became law in 1933 against the strong opposition of the company. In that same year the Act was submitted to the voters by referendum and narrowly sustained despite more open opposition by the company."
38 California Law Review 626.

at pages 21 through 26 of their brief base their argument upon a request by Richard Boke, California Regional Director of the Bureau of Reclamation and one of the original defendants in this case, for an appropriation from Congress "for water rights $332,000.00". THE ANSWER TO THIS CONTENTION OF RESPONDENTS IS THAT CONGRESS NEVER GAVE MR. BOKE ANY MONEY FOR THE ACQUISITION OF WATER RIGHTS AFTER THIS SUIT WAS FILED AND AFTER THE TIME HE MADE HIS REQUEST IN 1948 UNTIL HIS FORCED RETIREMENT FROM THE BUREAU OF RECLAMATION.

This is shown by the Appropriations Acts of Congress. This suit was filed in 1947 to force Mr. Boke, Secretary of the Interior Krug and Commissioner of Reclamation Strauss to obey the Congressional Acts involving the operation of the Central Valley Project and particularly to enforce the provisions of the county of origin and watershed protective statutes.

Due to Boke's refusal to carry out these statutes Congress eliminated the salaries of both Boke and Strauss in an effort to force them out of the Bureau of Reclamation. The history of the efforts of Congress to get rid of Boke and Strauss are set forth at page 19 of our brief in companion case No. 31. Finally and what is more important respondents in the very act which opposing counsel quoted as granting Boke money to take the rights of respondents which it did

not (Interior Department Appropriation Act for 1949, 62 Stat. 1112), the salaries of both Boke and Strauss were eliminated.

FINALLY, AND MORE IMPORTANT, OPPOSING COUNSEL ARE ENTIRELY SILENT REGARDING THE ACT OF OCTOBER 14, 1949, 63 Stat. 852-853, which specifically provided that the respondent Bureau of Reclamation officials were to proceed in their operation of the Central Valley Project in accordance with California county and area of origin statutes.

> "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, that the Central Valley Project, California, authorized by section 2 of the Act of Congress of August 26, 1937 (50 Stat. 850), is hereby *reauthorized* * * *.
>
> "Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)
>
> Act of October 14, 1949, 63 Stat. 852, 853.

D. Respondents Failed to Answer City of Fresno's Contention That They Are Entitled to Receive at Least 100,000 Acre-Feet of Water Out of the Central Valley Project at a Rate Not to Exceed $3.50 Per Acre-Foot.

1. Fresno's Need for 100,000 Acre-Feet of Water Before Water Is Taken Out of the County of Origin and Watershed of the San Joaquin River.

At pages 80 and 81 of petitioner's opening brief in this case, No. 51, October Term, 1962, of this Court, testimony of respondent Bureau of Reclamation officials is set forth showing that Fresno's water supply from the underground is limited to 30,000 acre-feet per year and that it needs a supplemental surface supply from Friant Dam of 100,000 acre-feet. No one so far in this case has disputed this fact. We will therefore not go into this matter again.

The California Water Rights Board has the following to say on the City of Fresno's needs:

> "Incontestable evidence supports the contention of both the City and the District as to existing deficiencies in water supply. This deficiency is most graphically illustrated by the severe and sustained drop in ground water levels throughout the Unit in recent years indicating a continuous mining of water stored in the underground water basin comprising the Fresno Ground Water Unit (FID 7). The serious nature of the situation is unquestioned. Obtaining a supply to overcome present deficiencies will not long provide a solution to the problem inasmuch as the deficiencies are increasing at an ever increasing rate as new demands on the supply develop. Eventually new wa-

ter sufficient to meet the present overdraft on the Unit and provide for its ultimate development must be forthcoming if the economy of the area is to flourish."

State of California, Water Rights Board, Decision No. D-935, Adopted June 2, 1950, p. 27.

The District Court also found that the City of Fresno's water supply had reached the critical point.

"Under the evidence the City of Fresno is in pressing present need of an additional supply of water for domestic and municipal purposes; *it is reaching the critical point.*" (emphasis ours)

Rank v. (Krug) United States, 142 F. Supp. 4, 184 (1956), R. 22.

Secretary of the Interior, Krug, the original defendant in this case, Richard Boke, and the Commissioner of Reclamation, Michael Strauss, continuously reported to Congress that the counties to the east side of the upper San Joaquin Valley, which included the counties of Madera, Merced, Fresno, Tulare, Kings and Kern, would receive water for industrial, municipal and miscellaneous uses at the rate of 200,000 acre-feet of water from Friant Dam annually.[18]

Boke, in spite of his representations to Congress, deliberately attempted to exclude all municipalities from sharing water in these six counties. As a result only two contracts for municipal water were executed: The city of Orange Cove, 1,400 acre-feet annually and Fresno County Water Works District No. 18, 150

[18] "*1,000 municipal, industrial, and miscellaneous uses.* * * *; * * *"

"East side upper San Joaquin Valley—200,000 (ac. ft.)"

acre-feet annually out of an average annual flow of the San Joaquin of 1,751,500 acre-feet annually.[19] It was not until after the City of Fresno had filed suit in this action before the California Water Rights Board and after Krug, Strauss and Boke had been eliminated from the Bureau of Reclamation that certain former great Bureau of Reclamation engineers aided the City of Fresno in obtaining a contract in 1961 for 60,000 acre-feet of surface water from the Central Valley Project at a rate of $10.00 per acre-foot.

THE CITY OF FRESNO'S CONTRACT, HOWEVER, PROVIDES THAT THE AMOUNT COULD BE INCREASED AND THE PRICE DECREASED IN ACCORDANCE WITH THE FINAL DECISION OF THIS COURT IN THIS CASE.

In accordance with the contracts, in accordance with the representations of the original defendant to Congress that 200,000 acre-feet of municipal, industrial and miscellaneous water was to be allocated to the cities of the six counties of the upper San Joaquin Valley, and in accordance with the testimony of the respondent Bureau of Reclamation officials themselves that the City of Fresno needs 100,000 acre-feet of water, we ask this Court to reverse the lower Court and sustain the decision of the District Court in this case (142 F. Supp. 1 (1956)) and to at least grant the City of Fresno 100,000 acre-feet of water.

For further authorities on the City of Fresno's undoubted right to a municipal water supply before water

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[19] R. 2281, 2933, Pltf. Ex. 106A.
R. 309, Pltf. Ex. 136, Senate Document No. 113, 81st Congress, 1st Session (1949), p. 108.

is transported out of the county of origin and the watershed of origin see pages 54 to 97 of petitioners' opening brief.

Finally, respondents at page 31 of their brief make an admission which completely destroys any objection to the county of origin legislation where they admit that the county of origin statute could apply to unappropriated water on State applications assigned to the United States and to the water which they might now seek to obtain by eminent domain.[20]

As heretofore shown at page 108 of our brief in case No. 31 [Pltf. Ex. 440-A, Rep. Tr. 23,831] there are 300,500 acre-feet of surplus water flowing below Friant Dam available for appropriation in addition to the 183,500 acre-feet of water necessary to operate the Court's plan of physical solution, which according to respondents' own admission, the county of origin statute would apply to the California Water Rights Board in its decision No. D-935, June 2, 1959, giving this surplus water to the Bureau of Reclamation "subject to the vested rights of the petitioners."

Likewise the claim of opposing counsel that these watershed and county of origin protective water rights

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[20] "In any event, the county of origin statute could affect only unappropriated water covered by state applications to appropriate assigned to the United States and could not affect water rights acquired by the United States for project purposes by other means, such as purchase, exchange, or the exercise of the power of eminent domain."

Brief of Respondents, Case No. 51, October Term, 1962, page 31.

had been taken by eminent domain is clearly answered in the opinion of the Attorney General, which was written by one of opposing counsel, as follows:

> "The legislative background of the priority makes it difficult to conceive that the Legislature intended that the authority could destroy the priority by condemnation. Since the priority exists only as against the authority, such a construction would completely destroy the effect of Section 11400 and make its enactment an idle gesture."
>
> 25 Opinions, Attorney General, p. 21 (1955).

and by the fact that in view of the express prohibition by Congress in the Act of October 14, 1949, 63 Stat. 852, respondent Bureau of Reclamation officials were powerless to take these rights by eminent domain.[21]

Likewise, they attempt to claim that the City of Fresno's percolating water rights are limited to lands owned by the City of Fresno which appears in the footnote of page 7 of their brief is clearly without merit. The claim of the City of Fresno in this case is the claim to overlying percolating water rights which in the State of California are the same as riparian rights. In addition the city owns a 1,500-acre airport largely devoted to crops and trees, a 200-acre park and several

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[21] "The power of eminent domain is vested solely in Congress and the executive has no inherent power in nature of eminent domain." (Syllabus)

"The taking of private property for public use by an officer of the United States, unless authorized, expressly or by necessary implication to do so by some Act of Congress, is no act of Government." (Syllabus)

Youngstown Sheet & Tube Co. v. Sawyer, 103 Fed. Supp. 569, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

thousand acres of parking strips adjoining the city streets lying over the alluvial cone of the San Joaquin. However, the situation of the City of Fresno in regard to percolating water rights is entirely distinct from the cases of *San Bernardino v. Riverside*, 126 Cal. 7 (1921), and *Pasadena v. Alhambra*, 33 Cal. 2d 908 (1949). The City of Fresno by Ordinance 2336 took all of the overlying percolating water rights of the individual landowners in Fresno and has continuously held them since.[22] This fact clearly distinguishes the case of *San Bernardino v. Riverside, supra*, and *Pasadena v. Alhambra, supra*, cited by respondents at pages 7 and 8 of their brief where neither San Bernardino nor Pasadena had taken their right of individual owners to pump from the underground.

In the first place, as found by the California Water Rights Board the respondent districts are now receiving too much water and their contracts may have to be eventually cut down.[23]

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[22]"That from and after August 1, 1937, the drilling and/or drilling of wells within the City of Fresno by private individuals, corporations, copartnerships, associations, public utilites other than municipally owned public utilities * * * for human use and/or consumption be and the same is hereby prohibited."

City of Fresno Ordinance 2336, August 1937.

[23]"With the exception of the Madera Irrigation District and Chowchilla Water District which have used only about 66 per cent of their contract allotments, ground water levels have been rising since 1951 more or less steadily in all of the districts receiving water under long-term water delivery contracts with the United States. This rise, coupled with notice of the quantities of water delivered, average probable future contractual deliveries, and acreages irrigated, presents a strong inference that some readjustment downward of contractual quantities may ultimately be not only desirable but necessary to prevent water logging of valuable agricultural lands."

State of California, State Water Rights Board, Decision No. D-935, Adopted June 2, 1959.

(a) *Section 9(c) of the Act of 1939, 53 Stat. 1187.*

Although we have already shown that there is no shortage of water for irrigation purposes and that the question of the legality of the above act should not therefore be an issue, nevertheless respondents attempt to make it an issue. Therefore, we feel that this Court should declare Section 9(c) of the Act of 1939, (53 Stat. 1187) unconstitutional. The reasons for this are that the *only* rivers in the area from which Fresno can obtain a surface supply are the San Joaquin, the Kings, the Tule, the Kaweah and the Kern. At the present time on each of these rivers, the United States has either completed a dam such as they have on the San Joaquin, Kings and Kern, or are now constructing dams on the other two streams, the Kaweah and the Tule. All of the waters on the Kings, Tule, Kaweah and Kern are being put to beneficial uses under prior rights *in counties and watersheds of origin in which Fresno is not situated.* The City of Fresno is located in the watershed and county of origin of the San Joaquin River only. It cannot take water from the counties of origin or watershed of the other remaining rivers in the San Joaquin Valley by any legal process. *It must obtain its supply from Friant Dam or be destroyed.*

Clearly the right of human beings in the county and watershed of origin to water to sustain their own existence is paramount over the transportation to other counties and watershed for secondary agricultural uses, especially where we now have more than 50,000,000 acres of surplus agricultural land in production according to Secretary Freeman.

It is submitted that under the Fifth Amendment to the Constitution Congress itself has no power to destroy the lives of the citizens of our cities by taking water which they vitally need and using it for secondary agricultural uses.

We feel that the words of former Justice Brandeis of this Court in his dissenting opinion in *United States v. Burleson* are particularly appropriate.

> "A law by which certain publishers were unreasonable or abritrarily denied the low rates would deprive them of liberty or property without due process of law; and it would likewise deny them the equal protection of the laws.
>
> "* * *. It would be going a long way to say that in the management of the post office the people have no definite rights reserved by the First and Fifth Amendments to the Constitution."
>
> *United States v. Burleson*, 255 U. S. 407, 41 S. Ct. 325, 65 L. Ed. 704 (1921).
>
> "* * * discriminatory legislation may be so arbitrary, injurious or unjustifiable as to be violating of the due process clause in the Fifth Amendment."
>
> 16A C. J. S. 587;
>
> *Bolling v. Sharpe*, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954).

We feel that due to the powerful farm lobby in Congress this section could not be amended and that we must rely on this court as the cities did in their apportionment fight before this court to secure fair representation between urban and rural areas in Congress.

Finally, if Section 9(c) of the act of August 4, 1939, 53 Stat. 1187 is an issue here, we respectfully ask this court, not only in the interest of Fresno, but in the interest of the health and welfare of the citizens of every city in the United States, that it declare the following portion of Section 9(c), act of August 4, 1939, 53 Stat. 1187, unconstitutional:

> "No contract relating to municipal water supply * * * shall be made unless in the judgment of the Secretary it will not impair the efficiency of the project for irrigation purposes."
>
> Act of August 4, 1939, 53 Stat. 1187, 1194.

We feel that the Act of 1939 is also unconstitutional since it violated the comity between the United States and the State of California and is not in accord with the present policy of Congress as illustrated by the Act of July 28, 1954, relating to litigation regarding the DeLuz Dam on the Santa Margarita River in California reading as follows:

> "'Sec. 2. (a) *In the interest of comity between the United States of America and the State of California and consistent with the historic policy of the United States of America of Federal non-interference with State water law, the Secretary of the Navy shall promptly comply with the procedures for the acquisition of appropriative water rights required under the laws of the State of California* as soon as he is satisfied, with the advice of the Attorney General of the United States, that such action will not adversely affect the rights of the United States of America under the laws of the State of California.'

"'Sec. 3. (c) *For the purposes of this Act the basis, measure, and limit of all rights of the United States of America pertaining to the use of water shall be the laws of the State of California:* * * *.'" (emphasis in original)

United States v. Fallbrook Public Utility District, 165 F. Supp. 806, 842 (1958).

2. Since None of the Respondents in Their Petitions for Certiorari Attacked the Finding of the District Court That Any Charge to the City of Fresno in Excess of $3.50 Per Acre-Foot Was Unreasonable and Illegal, No Attack at This Time Can Be Made on This Part of the Decision of the District Court.

The only question now before this Court is whether the determination of the District Court that any charge for strictly irrigation water (not municipal water) to the City of Fresno in excess of $3.50 an acre foot was arbitrary, unreasonable and in excess of the statutory authority of the Bureau of Reclamation officials was a judicial decision as held by the District Court, or an administrative decision as held by the Court below. The Court below reversed the decision of the District Court, holding that the question of whether a charge to the City of Fresno for strictly Class I irrigation water in excess of $3.50 per acre-foot was unreasonable, arbitrary and illegal, was strictly an administrative decision not a judicial decision. None of the respondents in their petition for certiorari attacked that part of the finding of the District Court holding charges for irrigation water to the City in excess of $3.50 per acre-foot was unreasonable and illegal. They rely entirely upon the holding of the Court below that such a decision was an administrative and not a judicial de-

cision.[24] There can therefore now be no attack on the finding of the District Court that any charge to the City of Fresno in excess of $3.50 per acre-foot was unreasonable and illegal.

We submit that the determination of whether a water rate charged by respondent Bureau of Reclamation officials is unreasonable, arbitrary, illegal or in excess of the authority conferred upon them by Congress is clearly a judicial and not an administrative decision and that the Court below was in error in holding to the contrary.[25]

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[24]"* * *. It is their administrative function to determine the rates at which water shall be delivered. It cannot be said that their statutory authority is limited to the making of such determinations as the courts may find to be reasonable."

State of California, United States of America v. Rank, 293 F. 2d 340, 352 (1961).

[25]Unreasonable has been defined as meaning "arbitrary": *Wisconsin Telephone Co. v. Public Service Commission*, 287 N. W. 122, 232 Wis. 274 (1939); *Harris v. State Corporation Commission*, 46 N. M. 352, 129 P. 2d 323 (1942); *State v. Public Commission*, 179 S. W. 2d 132, 238 Mo. 317 (1944); "capricious": *Wisconsin Telephone Co. v. Public Service Commission*, 287 N. W. 122, 232 Wis. 274 (1939); *Harris v. State Corporation Commission, supra*; "illegal": *City of Louisville v. Koenig*, 162 S. W. 2d 19, 290 Ky. 562 (1942); "without support in evidence": *Application of Chicago B. & Q. R. Co.*, 295 N. W. 389, 138 Neb. 767 (1940); "confiscatory": *Lone Star Gas Co. v. State*, 158 S. W. 2d 681, 137 Tex. 279 (1941); and "irrational": *Harris v. State Corporation Commission*, 46 N. M. 352, 129 P. 2d 323 (1942).

It is for the courts to determine whether a water rate is reasonable or unreasonable, arbitrary, capricious or illegal. This is a judicial not an administrative function.

Sackett v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);

Yuma County Water Users' Ass'n. v. Schlecht, 262 U. S. 438, 43 S. Ct. 498, 67 L. Ed. 909 (1922);

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937);

Magruder v. Belle Fourche Valley Water Users' Ass'n., 219 F. 72 (8th Cir.) (1914).

Moreover, we again submit that such a suit is not a suit against the United States.

Scaigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);

Yuma County Water Users' Ass'n. v. Schlecht, 262 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909 (1922);

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937).

"* * *. The questions whether or not the *charges* alleged to be illegal and the acts and threatened acts of executive officers depriving the shareholders of a water users' association of water * * * are justified by law, are questions of law which a court of equity is empowered to determine in a suit of such an association against such executive officers, although the Secretary of the Interior

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"12. The public have a right to be exempt from unreasonable exactions * * *." (Syllabus)

Smyth v. Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819 (1898).

"The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable. * * *. But that involves an inquiry as to what is reasonable and just for the public. * * *. The public cannot properly be subjected to unreasonable rates * * *."

Covington & L. Turnpike Co. v. Sanford, 164 U. S. 578, 17 S. Ct. 198, 41 L. Ed. 560, 566 (1896).

Stark v. Wickard, 321 U. S. 288, 64 S. Ct. 559, 88 L. Ed. 733 (1944) (enjoining Secretary of Agriculture from enforcing unreasonable minimum milk prices set by him).

"* * * when a case arises in which it becomes necessary to determine whether a properly established rate is a reasonable or constitutional *one, either to protect the public against excessive or unreasonable charges*, or its constitutional rights * * *, the courts may determine the reasonableness of such rate and may enjoin the enforcement of an unjust, unreasonable, rate." (Emphasis ours)

43 Am. Jur. 593, 694.

or other executive officers have already decided them.

"3. United States — 'Suit Against United States' Inference With Rights.

"A suit against executive officers of the United States to enjoin them from committing acts unauthorized by or in violation of law, to the irreparable injury of the property rights of the plaintiff, is not a suit against the United States', nor is it or the injunction south objectionable, either on the ground that they interfere with the property or the possession of the property of the United States. * * *." (emphasis ours)

Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 Fed. 72, 73 (8th Cir.) (1914);

United States v. Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171 (1882);

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937).

Neither does the decision of the District Court in this case "direct the disposition of property owned by the United States" as averred by opposing counsel.

It is further submitted that the mere fact that the record title to the reclamation works is in the government or even if we assume that the title to the water is in the government and not in the respondent districts which it is not, the jurisdiction of this Court would not thereby be defeated as stated by this Court:

"* * * But public officials may become tortfeasors by exceeding the limits of their authority.

And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law *or in equity*, he is not relegated to the Court of Claims to recover a money judgment." (emphasis ours)

Land v. Dollar, 330 U. S. 731, 739, 67 S. Ct. 1009, 1012, 91 L. Ed. 1209 (1946).

"Suits to restrain Secretary of Interior from enforcing his predecessor's orders limiting plaintiffs' water right appropriations in unit of federal reclamation project in alleged violation of plaintiffs' contracts with government held not dismissible for nonjoinder of United States as defendant on ground that United States was owner of water rights and relief sought was substantially specific performance of executory contract with government, * * *.

"* * *.

"Exemption of United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded, and in case of injury threatened by his illegal action, officer cannot claim immunity from injunction process."

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 413, 81 L. Ed. 525 (1937). (Syllabus)

"1. The fact that the legal title to allotable Indian lands is still in the government does not defeat the jurisdiction of a court over a suit to compel the Secretary of the Interior to undo, as wholly unwarranted and unauthorized by law his action in summarily erasing from the approved rolls of citizenship in the Choctaw and Chickashaw Nations the name of one who has received an al-

lotment certificate and is in the possession of the land." (Syllabus)

Garfield v. United States, ex rel. Goldsby, 211 U. S. 249, 262, 29 S. Ct. 62, 66, 53 L. Ed. 168, 174 (1908);

United States v. Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171 (1882);

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937);

State of Nebraska v. State of Wyoming, 325 U. S. 589, 65 S. Ct. 1332, 89 L. Ed. 1815 (1945).

Finally, title to the water in the Central Valley Project is not in the government but in the landowner subject to prior rights of original plaintiffs.

"* * * that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

Act of June 17, 1902, 32 Stat. 388, 390, 43 U. S. C. Sec. 391.

Congress in its legislation regarding the Central Valley Project again reaffirmed the above provision and provided that the water from a reclamation project is appurtenant to the land and therefore owned by those landowners being served from the project.

"* * *. That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

Act of July 2, 1956, 70 Stat. 483, 484.

Moreover, this is the holding of this Court.

"Section 8 of the Reclamation Act of June 17, 1902, 43 U. S. C. A. 372-382, provided: * * * that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated. * * *. We can say here what was said in Ickes v. Fox, supra, 300 U. S. pages 94 and 95, 57 S. Ct. page 416, 81 L. Ed. 525: 'although the government diverted, stored and distributed the water the contention of petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government but under the Reclamation Act for the use of the landowners, and by the terms of the law and of the contract already referred to *became the property of the landowners* wholly distinct from the property right of the government in the property right of the government in the irrigation works. Compare Murphy v. Kerr, (D. C.) 296 F. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (Id.) with the right to receive the sums stipulated in the contract as reimbursement * * *.'" (emphasis ours)

State of Nebraska v. State of Wyoming, 325 U. S. 589, 613-614, 65 S. Ct. 1332, 1349, 89 L. Ed. 1815 (1945);

Ickes v. Fox, 300 U. S. 82, 95, 57 S. Ct. 412, 416, 81 L. Ed. 525 (1937).

Additional authorities on this point are to be found at page 104 of our opening brief in this case.

3. The Spurious "Feasibility Report" Contained in House Document 146, 84th Congress, 2nd Session, 1956, (Pltf. Ex. 139) Meant Nothing to Congress.

As we have heretofore stated, no respondent raised the question in their petition for certiorari of whether the findings of the District Court that any charge to the City of Fresno for strictly irrigation water—not municipal water although to be used for municipal purposes—in excess of $3.50 an acre-foot was unreasonable, arbitrary and illegal (see districts' petition for certiorari, Case No. 966, October Term, 1961, pages 3-4, and Solicitor General's petition for certiorari, Case No. 366, October Term, 1961, page 2). Respondents attempt at page 28 of their brief to justify the charge of respondent Bureau of Reclamation officials of $10.00 per acre-foot for irrigation water to the City of Fresno by saying that such a charge had been called to the attention of Congress. It is submitted that respondents should not be allowed in accordance with the rules of this Court to present issues not set forth in their petition for certiorari.

> "(2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari *but the brief may not raise additional questions or change the substance of the questions already presented in those documents.*" (emphasis ours)
>
> Federal Practice and Procedure Rules Ed., Barron and Holtzoff-Wright, Vol. 3A, p. 1539 (1958).

Without waiving our objection that respondents did not mention this point in any petition for certiorari it

may be stated, however, that there is no merit in respondents' argument that Congress had been advised of the $10.00 charge by House Document 146, 80th Congress, 1st Session (1947); 1 Engle, Central Valley Project Documents (1950), House Document 416, 84th Congress, 2nd Session, 574. This document was an illegal and fraudulent attempt by Secretary of the Interior Krug, Commissioner of Reclamation Strauss and Richard Boke as California Regional Director of the Bureau of Reclamation to illegally make a second feasibility report on the Central Valley Project. As will be observed from page 6 of said document, it purports to be a "feasibility report" on the Central Valley Project, California.

> "REPORT ON THE ENGINEERING FEASIBILITY, THE TOTAL ESTIMATED COSTS, AND THE ALLOCATION AND PROBABLE REPAYMENT OF THESE COSTS, OF THE CENTRAL VALLEY PROJECT, CALIFORNIA"

However, it cannot legally be such a feasibility report because *this Court* found that the only feasibility report on the Central Valley Project as required by the Act of December 5, 1924, 43 Stat. 672 at 702, (see Appendix D of our opening brief, page 9) is the feasibility report of December 2, 1935, signed by President Roosevelt.[26]

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[26] "But it also is true, as pointed out by the claimants, that in these Acts Congress expressly 'reauthorized' a project already initiated by President Roosevelt who, on September 10, 1935, made allotment of funds for construction of Friant Dam and canals under the Federal Emergency Relief Appropriation Act, 49 Stat. 115, 118, Section 4, and provided that they 'shall be reimbursable in accordance with the reclamation laws.' A finding of feasibility, as required by law, was made by the Secretary of the Interior on November 26, 1935, making no reference to

This spurious feasibility report was made by the Secretary of the Interior Krug, Commissioner Strauss and Regional Director Boke in House Document 146 in an abortive attempt to change the fundamentals of the Central Valley Project to a Congress which by this time had lost all confidence in them and which Congress finally terminated the salaries of Boke and Strauss in an effort to force them from Government Service. As shown by the statement of Secretary Krug in 1947 made shortly after this report, Congress had lost confidence in these gentlemen.

> "At the same Salt Lake City Conference (1947) Secretary Krug made the following statements: 'This program is probably closer to my heart than any other in the Department of the Interior and as Mike (Michael Strauss, Commissioner of the Bureau of Reclamation) pointed out to you, for some strange reason *people up in Congress don't trust us like they used to.* * * *.'" (emphasis ours)
>
> Investigation of the Bureau of Reclamation, 19th Intermediate Report of the Committee on Expenditures in the Executive Dept., August 7, 1948, House Report No. 2458, pp. 555-556.

The following statement made by the late California Senator Downey, whom the original plaintiffs and the City of Fresno had appealed in their efforts to obtain water, is indicative of the lack of regard of Congress for Secretary of the Interior Krug at the time respond-

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navigation, and his recommendation of 'the Central Valley development as a Federal reclamation project' was approved by the President on December 2, 1935."

United States v. Gerlach Live Stock Co., 339 U. S. 725, 731-732, 70 S. Ct. 955, 958-959, 94 L. Ed. 1231 (1950).

ents claim Congress had seriously considered the spurious "Feasibility Report of 1946":

> "Senator Downey. Secretary Krug: What part does he play in the Central Valley drama—this tragedy, comedy or farce—however you may wish to describe it? When Mr. Krug was brought to the exalter office he now holds, I thought order would succeed chaos in the Central Valley. Instead, I think with the bard that 'confusion now hath made his masterpiece'."
>
> Investigation, Bureau of Reclamation, Committee on Expenditures, Executive Department, 80th Congress, 2nd Session, page 140.

So far as Mr. Strauss was concerned, the following statement appearing in the congressional investigation of Mr. Strauss is particularly pertinent as showing no credence was given to him on the recommended rates for water.

> "Mr. Blanks * * *. Throughout the period of reclamation history, there has been built up the greatest engineering organization the world has known. It is world-renowned. It is something that the people of this country can well be proud of. It is something that all of us have been proud to be connected with. That engineering organization under the present administration of the Bureau of Reclamation has been wrecked, practically wrecked. * * *."
>
> *Investigation of the Bureau of Reclamation*, Department of the Interior, Executive Department, House of Representatives, 80th Congress, 2nd Session, page 699.

"Referring to Mike Strauss, Chief of the Bureau of Reclamation over Boke: 'Senator Downey: Mike Strauss: Succeeding Bashore, he stepped down from a higher position so that he could enforce his will more directly. As ignorant of engineering, irrigation, and western conditions as any man could be, with no important administrative experience behind his entry into the government service, Mr. Strauss represents the zealot, the politician, the idealogist who lives by the manipulation of propaganda, freely dispatched at public cost; * * *."

Investigation of the Bureau of Reclamation, Department of the Interior, Executive Department, House of Representatives, 80th Congress, 2nd Session, page 140.

The following finding by the Congressional Committee showed what Congress thought of Mr. Boke.

"* * * your committee has reached the conclusions, based on incontrovertible evidence, Mr. Boke does not possess the qualifications necessary to administer the gigantic Central Valley Project."

Investigation of the Bureau of Reclamation, Department of the Interior, Executive Department, House of Representatives, 80th Congress, 2nd Session, page 10.

This distrust of Congress for Secretary of the Interior Krug, Commissioner of Reclamation Strauss and Regional Director Boke due to their actions in attempting to misrepresent their actions in the Central Valley Project to Congress and their illegal attempts to charge illegal municipal water rates and to deprive petitioner

City of Fresno and others in the watershed and county of origin of the Central Valley Project of water finally resulted in Congress attempting to get rid of these gentlemen by cutting off the salary of at least two of them.

"* * * Pursuant to the Harness Committee report, the Same Congress adopted in the Interior Department Appropriation Act for 1949 the so-called 'Straus-Boke rider.' This act (Public Law 841, 80th Cong.; 62 Stat. 1112) * * *:

"*(Provided further,* That after January 31, 1949, no part of any appropriation for the Bureau of Reclamation contained in this Act shall be used for the salaries and expenses of a person in any of the following positions in the Bureau of Reclamation, or of any person who performs the duties of any such position, who is not a qualified engineer with at least five years' engineering and administrative experience: (1) Commissioner of Reclamation; (2) Assistant Commissioner of Reclamation; and (3) Regional Director of Reclamation.)"

Central Valley Project Documents, Part 2, Operating Documents, House Document 246, 85th Congress, 1st Session, pages 684, 685.

The congressional statute was applicable to both Boke and Strauss.

"The rider on the 1949 appropriation bill was applicable to both the Commissioner and the Regional Director in California, neither of whom was a professional engineer."

Central Valley Project Documents, Part 2, Operating Documents, House Document 246, 85th Congress, 1st Session, page 685.

Clearly then the question of a fraudulent and illegal socalled Feasibility Report in which a rate of $10.00 is mentioned for municipal water had little or no effect on the Acts of Congress.

Even if Congress had considered it they never made an effort to amend the Act of August 4, 1939, 53 Stat. 1187, 1194, the Act of June 17, 1902, 32 Stat. 388, nor the Act of July 2, 1956, 70 Stat. 483, 484, which clearly limited water charges to municipalities and upon which acts the District Court made its determination that any charge to the City of Fresno in excess of $3.50 per acre-foot was unreasonable and illegal.

Moreover, as stated, respondents having failed to meet the issues set forth in the petitions for certiorari filed by the various parties *should not be allowed to raise issues which they did not raise in their petitions for certiorari,* and we therefore submit that clearly the finding of the District Court that any charge in excess of $3.50 per acre-foot to the City of Fresno was unreasonable, arbitrary and illegal must stand, irrespective of House Document 146.

E. The Rights of Tranquillity Irrigation District.

Respondents now agree there is no argument over Tranquillity Irrigation District as correctly stated by the Court below.[27]

As this Court stated, the Central Valley Project would replace water of those taken out of water for-

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[27] "1. Also intervening as plaintiff was the Tranquillity Irrigation District. This court is now advised that the dispute between this irrigation district and the Bureau of Reclamation has been resolved by agreement and no longer constitutes an issue upon appeal."

State of California, United States of America v. Rank, 293 F. 2d 340, 342 (1961). (Footnote 1).

merly used for crops.[28] For further discussions of the rights of Tranquillity Irrigation District, see pages 51 to 54 of petitioners' brief in companion case No. 51. Respondent Bureau of Reclamation officials recognized their right to substitute all water formerly used by Tranquillity Irrigation District and Tranquillity Irrigation District has accepted the formula of the Bureau as to the method of determining the amount to which they are entitled. So as correctly stated by the Court below, which statement has not been attacked in any petition for certiorari, there is no dispute now between Tranquillity and the United States or any of its officials.

F. The Lower Court Was in Error in Relieving the Respondent Districts From the Injunction. It Was, However, Correct in Not Dismissing Them as Parties.

Most of the respondent districts voluntarily intervened in this action and filed a complaint alleging that

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[28] "* * * the plan as originally adopted and as carried out by the Bureau included replacement at great expense of all water formerly used for crops and 'controlled grasslands'. * * *." (emphasis ours)

United States v. Gerlach Live Stock Co., 339 U. S. 725, 740, 70 S. Ct. 955, 963, 94 L. Ed. 1231 (1950).

"*Delta-Mendota Canal* will carry surplus Sacramento River water 120 miles southerly from the Delta to *Mendota Pool* on the San Joaquin River. Here the water will be used to meet the demand of crop lands now irrigated by diversions *from San Joaquin River*." (emphasis ours)

R. 326 (New Volume) "Comprehensive Plan for Water Resources Development, Central Valley Basin, California," Harold L. Ickes, Secretary, United States Department of the Interior, Project Report No. 2-4.0-3, November, 1945, page 7.

they were the equitable owners of the water distributed out of Friant Dam.[29]

In fact the respondent districts were probably the actual owners of the water subject to the prior rights of petitioner City of Fresno and other original plaintiffs.

> "Section 8 of the Reclamation Act of June 17, 1902, 43 U. S. C. A., pages 382-392, provided: '* * * that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated * * * although the government diverted, stored and distributed the water, the contention of the petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the gov-

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[29] "VII. Allege that by virtue of the terms of said assignments the State of California has become and is the trustor or grantor of an express trust; the United States has become and is the trustee of that trust; the landowners to acquire rights to the use of water from the works of the Central Valley Project, including the landowners of defendant districts, have become and are the beneficiaries of that trust; * * *."

Excerpt from Answer to Plaintiffs' Complaint as Amended of Defendant Districts, Lindsay-Strathmore Irrigation, Lindmore Irrigation District, Ivanhoe Irrigation District, Saucelito Irrigation District, Orange Cove Irrigation District, Tulare Irrigation District, Lower Tule River Irrigation District, Stone Corral Irrigation District, Terra Bella Irrigation District, Porterville Irrigation District, Delano-Earlimart Irrigation District and Exeter Irrigation District, filed 10/16/61, R. 158.

"II. Answering Paragraph IV of said complaint in intervention, these answering defendants admit the allegations therein contained, save and excepting that defendants allege that the assignments therein set forth in Paragraph VII of said Amended Complaint in Intervention."

R. 125. Excerpts from Answer of Southern San Joaquin Municipal Utility District to State of California's Amended Complaint in Intervention, page 2.

ernment but under the Reclamation Act for the use of the landowners and by the terms of the law * * * the water rights became the property of the landowners wholly distinct from the property right of the government in the irrigation works."

State of Nebraska v. State of Wyoming, 325 U. S. 589, 613, 65 S. Ct. 133, 139, 89 L. Ed. 1815 (1945);

Ickes v. Fox, 300 U. S. 82, 95, 57 S. Ct. 412, 416, 81 L. Ed. 525 (1937).

Clearly under Section 379 of the Code of Civil Procedure, State of California, they were properly joined as defendants.

"Who may be joined as Defendants. Any person may be made a defendant who has or claims an interest in the controversy adverse to plaintiff."

California Code of Civil Procedure 379.

One of the claims of the respondent districts is that everyone having an interest in the water of the San Joaquin whether equitable or legal should have been joined in this suit. Had we not joined the respondent districts, they would now here be claiming that they should have been joined. If any further reason be needed that the respondent districts were properly joined as parties, it appears in the fact that they are here before the Supreme Court fighting the claims of the City of Fresno to water at a reasonable rate and still backing, encouraging and abetting the respondent Bureau of Reclamation officials rather than limiting their efforts to get out of this case. We submit that the following authorities clearly apply to this case.

During the trial before the District Court each counsel for each district insisted the districts were proper parties and that each counsel for *each* district had the right to cross-examine *each* of petitioners' witnesses. In one case the districts' counsel cross-examined one of petitioners' witnesses continuously for six weeks [April 10, 1952, to May 22, 1952, Rep. Tr. 3449-5307]. Their cross-examination and introduction in evidence took a majority of the time of the eighteen month long trial before the District Court at great cost to the City.

"Liability for trespass is not dependent upon personal participation, and one who aids, assists, or advises a trespasser in committing a trespass is equally liable with him who does the act complained of." (Syllabus)

Kirby Lumber Corporation v. Karpel, 233 F. 2d 373 (5th Cir.) (1956).

"31. Co-trespassers—It may be stated as a general rule that all persons who command, instigate, promote, encourage, advise, countenance, co-operate in, aid, or abet the commission of a trespass, or who approve it after it is done, if done for their benefit, are co-trespassers with the person committing the trespass and are liable as principals to the same extent and in the same manner as if they had performed the wrongful act themselves."

52 Am. Jur. 861.

"33. Persons Authorizing, Encouraging, or Directing Trespass. Any Person who aids, abets, encourages, or authorizes another in the commission of a trespass, even though not personally pres-

ent at its commission, is liable equally with him who commits it."

52 Am. Jur. 862.

"The person authorizing the doing of an act of trespass by another is liable, whether the authorization is express or implied. * * * advises it, encourages, procures, or incites it, or conspires with the actual doer for the doing of it is liable."

87 C. J. S. 987.

The respondent districts therefore are not here asking to get out, but are continuing to assert their rights which they have done in the past at great cost to the petitioner City of Fresno by taking months of the trial and appeal time, with their voluntary appearance, cross-examinations, and introduction into evidence of great volumes of testimony.

For other authorities showing why the Court below should not be reversed in relieving the respondent districts from the effect of the District Court's injunction and showing that the lower Court should be reversed for relieving the districts from the District Court's injunction, we refer to our opening brief in this case, pages 153 to 163 inclusive.

G. The United States Has Waived Its Immunity to Suit in This Action.

We again refer to and incorporated by reference petitioners' argument set forth at pages 116 to 137 of our opening brief, which we submit shows a complete waiver of immunity by the United States under the Act of July 10, 1952, 66 Stat. 518, 560.

VII.

CONCLUSION.

The districts having failed to answer petitioners' argument in lieu thereof have attempted to raise issues which were not raised in any petition for certiorari of any party. As it is impossible to go through 50,000 pages of transcript in the few days left to answer, we do not think raising new points is fair to either this Court or counsel and that these new issues should not be considered under rule 40(d)(2).

The districts also failed to cite any authorities in opposition to the City's contention that determination of the statutory authority of an act of a federal official and the determination of whether rates charged the cities of this Nation for water from reclamation projects (in this case $3.50 per acre-foot) is unreasonable, arbitrary and in excess of respondent Bureau of Reclamation officials' statutory authority are judicial or administrative determinations.

Finally, it has been shown that the City of Fresno is admittedly in desperate need of water. There are only five rivers in the entire San Joaquin Valley from which this water can possibly come from: The Kern, Kaweah, Tule, Kings and the San Joaquin Rivers. Fresno lies in the county and watershed of only one of these rivers — the San Joaquin. It therefore cannot get water from any other source. It must either get water from Friant or perish. The City should not be deprived of water.

If this Court feels that Section 9(c) of the Act of August 4, 1939, 53 Stat. 787, bars the City of Fresno from obtaining all the water it needs to continue its

very existence, we ask that it rule said Section 9(c) unconstitutional.

We also request this Court to make the rulings which we requested at pages 165 through 169 of our opening brief in this said case No. 51, October Term, 1962, of this Court.

Respectfully submitted,

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Dated: December 31, 1962.